IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

THE STATE OF MICHIGAN,
Petitioner,

v.

GARY DeFILLIPO,
Respondent.

BRIEF FOR THE PETITIONER

WILLIAM L. CAHALAN
Prosecuting Attorney
EDWARD REILLY WILSON
Chief Appellate Attorney
TIMOTHY A. BAUGHMAN
Assistant Prosecuting Attorney
Wayne County
State of Michigan
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Constitutions:

Statutes:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

THE STATE OF MICHIGAN,
Petitioner,

v.

GARY DeFILLIPO,
Respondent.

BRIEF FOR THE PETITIONER

OPINION BELOW

The Opinion of the Michigan Court of Appeals, Division I, (Petition for Writ of Certiorari, Appendix A, pp 12-15), is reported at 80 Mich App 197; 262 NW2d 921 (1977).

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 6, 1977. The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was entered May 1, 1978. The Petition for Writ of Certiorari was docketed on May 24, 1977, and granted on October 2, 1978. The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

I

WHETHER AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE?

II

IS AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO *TERRY v OHIO*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF AND/OR REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY CONSTITUTIONAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. (R,3) Upon arrival at the alley the officers found respondent and a female who had her pants down. (R,3) She was intoxicated; respondent did not appear to be so. When asked for identification respondent replied that he was Sergeant Mash, a Detroit Police Officer. When asked his badge number he then stated that he worked for a Sergeant Mash. (R,4) He was arrested for failure to produce identification, handcuffed, and searched, the search producing marijuana. (R,4-5, 9) At the station phencyclidine was found in a pack of defendant's cigarettes. (R,6-7)

Respondent was charged with possession of phencyclidine. MCLA 335.341(4)(b); MSA 18.1070 (41)(4)(b). A motion to suppress evidence was denied, and on interlocutory appeal the Michigan Court of Appeals held the ordinance under which respondent was initially arrested unconstitutional (Detroit City Code 39-1-52.3). The court also rejected petitioner's

argument that the officer's good faith reliance on the ordinance which had not been declared unconstitutional at the time of the arrest rendered the arrest lawful. On May 1, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals, relying on *Powell* v *Stone*, 507 F2d 93 (CA 9, 1974), held that an arrest in good faith reliance on a penal ordinance which is subsequently declared unconstitutional is an unconstitutional arrest. The court also held Detroit City Code 39-1-52.3 unconstitutional.

Petitioner contends that the arrest was not unconstitutional, as it was completely reasonable given the facts and circumstances known to the officer at the time. The officer did not and could not know that the penal ordinance could subsequently be declared unconstitutional.

It is also petitioner's position that if the arrest was unconstitutional, the exclusionary rule ought not be applied. No legitimate purpose would be served by excluding the evidence, and failure to exclude it would not have the effect of inducing lawless police conduct.

It is further petitioner's contention that the ordinance is not unconstitutional. It is within the police power of the legislature to require that persons validly stopped for investigation answer an investigative inquiry as to identity. Moreover, the ordinance is not vague. The Michigan Court of Appeals thus erred in holding that the phencyclidine must be suppressed.

ARGUMENT

I.

AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID PENAL ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE.

A. The Opinion Below

In its opinion below, the Michigan Court of Appeals held that Detroit City Code 39-1-52.3 was void for vagueness.[1] Citing *United States* v *Harris*, 347 US 612; 74

[1] At the time of defendant's arrest, the ordinance read:

> When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity.

The ordinance was amended on October 19, 1976, beginning with the second sentence:

> It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to refuse to produce verifiable evidence, written or oral, of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity. Refusal to cooperate with the police officer by not providing verifiable evidence of his identity, or by not accompanying the police officer to the nearest precinct in order to verify his identity, shall be deemed an unlawful act.

Detroit City Code 1-1-7 provides that unlawful acts are punishable by 90 days or $500.00 fine.

S Ct 808; 98 L Ed 989 (1954), and *Papachristou* v *City of Jacksonville*, 405 US 156; 92 S Ct 839; 31 L Ed 2d 140 (1972), the court held that the ordinance "fails to give a person of reasonable intelligence fair notice that his contemplated conduct is forbidden" in that 1) a citizen cannot know when he has been validly stopped pursuant to *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and 2) a citizen cannot know what verifiable evidence of identity is. *People* v *DeFillippo*, 80 Mich App 197, 201; 262 NW2d 921, 923 (1978).

Secondly, the court held that the ordinance "seeks to make criminal conduct which is innocent." Quoting from *Davis* v *Mississippi*, 394 US 721, 727, fn 6; 89 S Ct 1394; 22 L Ed 2d 676 (1973), that (W)hile the police have a right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer," the court impliedly held that neither can the legislature require that persons stopped pursuant to *Terry* answer an inquiry regarding identity.

Thirdly, the court held that the "ordinance undercuts the probable cause standard of the Fourth Amendment" by sanctioning "full searches on suspicion."[2] *DeFillippo*, at 924.

Finally, preliminarily to its discussion of the ordinance, the court, citing *Powell* v *Stone*, 507 F2d 93, 98 (CA 9, 1974), rejected petitioner's argument that the question of the constitutionality of the ordinance should

[2] As will be developed subsequently, the search is not incident to the stop, but to the arrest for violation of the ordinance, here, by failing to identify.

not be reached because the officer's good faith reliance on the ordinance should preclude application of the exclusionary rule in any event. *DeFillippo*, at 923. It is petitioner's position that the Michigan Court of Appeals erred in reaching the question of the constitutionality of the ordinance, for an arrest made in good faith reliance on a penal ordinance which is subsequently declared unconstitutional is a valid arrest nonetheless; further, the court erred in holding the ordinance unconstitutional.

B. No Constitutional Violation Occurred

This Court has recently made plain that there is a distinction between ". . . what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established." *Scott* v *United States*, — US —; 56 L Ed 2d 168, 176 (1978). The position of the Government, which formed the basis of the Court of Appeals decision, 516 F2d 751, 757 (CA DC, 1975), was held by this Court to embody the "proper approach":

> In view of the deterrent purposes of the exclusionary rule, consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established. But the existence vel non of such a violation turns on an objective assessment of the officer's action in light of the facts and circumstances confronting him at the time. 56 L Ed 2d at 176-177.

In the instant case, then, does an "objective assessment of the officer's action in light of the facts and circumstances confronting him at the time" demonstrate that the officer unreasonably seized the person of respondent? The officer was aware of a presumptively valid penal ordinance, the enforcement of which was his duty. A violation of that ordinance occurred in his presence: respondent did not state his identity when requested, and in fact gave a false answer. The circumstance *not* known to the officer was that some months subsequent the Michigan Court of Appeals would declare that the ordinance which respondent violated was unconstitutional. It cannot be said that a circumstance not known to the officer at the time of arrest (and of which he cannot properly be charged with knowledge) related back to his conduct, rendering the seizure of respondent's person unreasonable under the Fourth Amendment.[3]

In *Brown* v *Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), Justice Powell, joined by Justice Rehnquist, stated in an opinion concurring in part that

---

[3] In *People* v *Carpenter*, 69 Mich App 81; 244 NW2d 338 (1976) defendant's auto was stopped after an officer observed a rifle case. At that time MCLA 750.227 had been construed to prohibit the carrying of rifles. The Michigan Supreme Court subsequently held that the statute only applied to stabbing weapons. *People* v *Smith*, 393 Mich 432; 225 NW2d 165 (1975). Carpenter was convicted for carrying handguns in a motor vehicle for pistols found pursuant to his arrest. He attacked his conviction on appeal by alleging his initial arrest was improper, citing *Smith*. The Court of Appeals held that only the facts, circumstances and information known to the officer at the time of the arrest could be considered and affirmed the conviction. *DeFillippo* cannot be squared with *Carpenter*.

the exclusionary rule ought not be applied to "technical" violations of the Fourth Amendment; for example, where ". . . officers in good faith arrest an individual . . . pursuant to a statute that subsequently is declared unconstitutional, see *United States* v *Kilgen*, 445 F2d 287 (CA 5, 1971)." 422 US at 611. Petitioner agrees that the exclusionary rule should not be applied where its purpose is not served (See C, *infra*), but submits that an arrest pursuant to a presumptively valid penal statute or ordinance which is subsequently declared unconstitutional is not even a "technical" violation of the Fourth Amendment; rather, it is no violation at all. *Scott* v *United States, supra*. That a court eventually holds, in a proper case, that the person arrested and held to answer in a criminal proceeding for violation of an ordinance or statute may not be convicted and incarcerated for the violation of that ordinance or statute because of a due process defect in the legislation does not mean, and should not mean, that the initial seizure of the person was unreasonable under the Fourth Amendment.

In both *United States* v *Kilgen*, 445 F2d 287 (CA 5, 1971) and *United States* v *Carden*, 529 F2d 443 (CA 5, 1976), the Fifth Circuit declined to discuss the constitutionality of the penal ordinances under which the respective defendants were arrested because in neither case was the defendant being prosecuted for violation of the ordinance. Had they been so prosecuted, said the court, then an attack on the ordinances would have been appropriate, but an attempt to exclude evidence seized pursuant to an arrest under the ordinances was not appropriate, for "This

court has held more than once that an arrest made in good faith reliance on a statute not yet declared unconstitutional is *valid*, regardless of the actual constitutionality of the ordinance" (emphasis added). *United States* v *Carden, supra* at 445. In the instant case, respondent was not being prosecuted for violation of the ordinance. The question of its constitutionality thus should not have been reached, as the seizure of his person in enforcement of the ordinance was in any event reasonable under the Fourth Amendment.[4]

Petitioner's position, then, is that a ruling that a penal ordinance or statute is unconstitutional does not render unreasonable under the Fourth Amendment a seizure of a person to answer for a violation of the ordinance or statute accompanied prior to the ruling. Further, the constitutionality of penal ordinances and statutes is appropriately litigated in prosecutions for their violation. The question then arises, what is to be made of cases such as *Almeida-Sanchez* v *United States*, 413 US 266; 93 S Ct 2535; 37 L Ed 2d 596 (1973), where a stop and search was held unreasonable under the Fourth Amendment though achieved pursuant to a statute which had not been declared unconstitutional at the time?[5] Petitioner submits that the answer lies in the nature of the statute involved in *Almeida-Sanchez*.

---

[4] See Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 Journal of Criminal Law and Criminology, (Dec. 1978, pp. 13-18 of draft).

[5] See also *Sibron* v *New York*, 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968); *United States* v *Brignoni-Ponce*, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

The statute involved, 8 USC 1357a, allowed warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States" as authorized by regulations to be promulgated by the Attorney General. The Attorney General defined "reasonable distance" to be "within 100 air miles from any external boundary of the United States." A search of an auto in *Almeida-Sanchez* pursuant to the statute revealed marijuana, and Almeida-Sanchez was prosecuted on a marijuana charge. 21 USC 176a. This Court held that the statute authorized unconstitutional searches and seizures, and overturned the conviction. *Almeida-Sanchez* is distinguishable from the case at bar.

8 USC 1357a is *not* a penal statute, unlike the ordinance involved in the present case.[6] Congress, in enacting 8 USC 1357a, was thus not engaged in its exclusive function of defining crime and ordaining punishment. *United States* v *Wiltberger*, 5 Wheat 76, 95; 5 L Ed 37, 42 (1820). The Fourth Amendment seizure of Almeida-Sanchez was not to hold him to answer for the violation of a penal statute; rather, the purpose of the statute was simply to authorize the seizure (and search). Petitioner agrees with *Almeida-Sanchez* that ". . . no Act of Congress can authorize a violation of the

---

[6] As noted in footnote 1 of the opinion of the Michigan Court of Appeals, the October 19, 1976 amendment to the ordinance only makes clear that which was implicit in the ordinance at the time of defendant's arrest: that refusal to identify is a crime. The detention portion of the ordinance does not render the ordinance an ordinance of criminal procedure, as in *Almeida-Sanchez*, rather, it is simply the only sensible alternative to the ordinary procedure of issuing an appearance ticket, employed, when the violator's identity is known, for most ordinance violations.

Constitution." 413 US at 272. Where the purpose of a statute is to authorize seizures and/or searches and not to define and regulate conduct criminally, and that authorization is in conflict with the Fourth Amendment, then a seizure or search pursuant to the statute is unreasonable and a violation of the Fourth Amendment, despite the fact that the police acted pursuant to its authorization in good faith. But this is a completely different matter from the case at bar. Here respondent was observed (or heard) to violate a penal ordinance, and was arrested to be held to answer for the violation. The legislature did not undertake solely to provide procedures for the seizures of persons, but to define conduct it wished to make criminal. In sum, a seizure of a person to answer for a crime does not become unreasonable if a court later holds that a person cannot constitutionally be convicted and imprisoned for violation of that statute; whereas, a seizure of the person not to answer for a crime but pursuant to a statute which authorizes the seizure itself is unreasonable if the procedure allowed by the statute is inconsistent with the Fourth Amendment.[7] In the former case, which is the instant case, there is no constitutional violation in the arrest and seizure of items incident to the arrest. *Scott* v *United States, supra*. Where prosecution is not for violation of the ordinance, the question of its constitutionality should not be reached, as it is irrelevant. The phencyclidine in the case at bar was not seized in violation of the Fourth Amendment. The decision of the Michigan Court of Appeals should be reversed.

---

[7] Whether suppression of evidence is then the appropriate remedy is another question, see C, *infra*.

C. Even If A Constitutional Violation Occurred, The Exclusion Of The Evidence Is Inappropriate Where The Officer Acted in Good Faith Reliance On An Ordinance Not Yet Declared Unconstitutional

Should this Court hold that an arrest pursuant to an ordinance which is subsequently declared unconstitutional is a seizure of the person in violation of the Fourth Amendment, then "consideration of official motives" comes into play in determining whether application of the exclusionary rule is appropriate. *Scott* v *United States, supra*. Petitioner agrees with the opinion of Justice Powell in *Brown* v *Illinois, supra*, that there is ". . . no legitimate justification for depriving the prosecution of reliable and probative evidence" in cases of "technical" violations of the Fourth Amendment, such as, where "officers in good faith arrest an individual . . . pursuant to a statute that subsequently is declared unconstitutional. . . ." 422 US at 611.[8]

This Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its purpose being to deter, not repair. *United States* v *Calandra*, 414 US 338, 348; 94 S Ct 613, 620; 38 L Ed 2d 561 (1974). Whether or not a suppression remedy should be applied after a constitutional violation has been demonstrated, *Scott* v *United States, supra*,

---

[8] See also Chief Justice Burger's dissent in *Bivens* v *Six Unknown Federal Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), criticizing the exclusionary rule because of its undifferentiating treatment of gross and technical violations of the Fourth Amendment.

depends on whether exclusion of the evidence would deter willful or negligent *police conduct* which violated some right of the accused. See *United States* v *Janis*, 428 US 433, 446; 96 S Ct 3021; 49 L Ed 2d 1046 (1976): "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, *'is to deter future unlawful police conduct'* " (emphasis added), and *Stone* v *Powell*, 428 US 465, 486; 96 S Ct 3037; 49 L Ed 2d 1067 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." *Accord Brown* v *Illinois, supra*, opinion of Justice Powell. The test is well-stated in *United States* v *Peltier*, 422 US 531; 95 S Ct 2313; 45 L Ed 2d 374 (1975), which held *Almeida-Sanchez, supra*, to be prospective:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed *only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment* . . . we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car. (emphasis added) 422 US at 542.

Keeping in mind the observation in *Calandra*, 414 US at 348, that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in *Michigan* v *Tucker*, 417 US 433, 446; 94 S Ct 2357; 42 L Ed 2d 182 (1974), that "where the official action was pursued in

complete good faith . . . the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Brown* v *Illinois, supra*. An arrest made in good faith reliance on a statute or ordinance which is later declared unconstitutional is not conduct which is deterred by the exclusionary rule, nor should it be the policy of the Court to attempt to encourage police officers, who are not "legal technicians," *Draper* v *United States*, 358 US 307, 313; 79 S Ct 329; 3 L Ed 2d 327 (1959), to make personal ad hoc legal judgments on the constitutionality of penal statutes or ordinances before undertaking to enforce them.[9]

As indicated previously, the Fifth Circuit has embraced the proposition urged by petitioner. In *United States* v *Kilgen, supra*, the court held that

> No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid. We therefore hold that the confession to the separate offense was admissible because it was obtained while Kilgen was detained and charged in good faith reliance on an ordinance not yet held invalid.

[9] In his dissent in *Peltier*, Justice Brennan asserts that the majority assumes that the deterrence rationale is based on punishment of individual officers, whereas in fact "the exclusionary rule, focused upon general, not specific, deterrence, depends not upon threatening a sanction for lack of compliance but upon removing an *inducement* to violate Fourth Amendment rights." 422 US at 558. But plainly in cases such as the instant one the only "inducement" offered by non-application of the exclusionary rule is that officers will be induced to enforce the law, which is their duty. Moreover, in many cases prior *case law* supported the officer's conduct — would application of the exclusionary rule be appropriate to deter courts from misconstruing the Constitution?

See also *United States* v *Carden, supra*. The Ninth Circuit has taken the opposite view. *Powell* v *Stone*, 507 F2d 93 (CA 9, 1974), rev'd on other grounds 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976). Recognizing that deterrence of police misconduct is not served by excluding evidence when officers arrest in good faith pursuant to a presumptively valid statute, the court found the remedy of suppression appropriate because ". . . the public interest is served by deterring legislators from enacting such statutes." 507 F2d at 98. Such a rationale for application of a suppression remedy has never been articulated by this Court; indeed, it runs directly counter to this Court's statements in *Janis*, *Powell*, and *Tucker* that the purpose of the exclusionary rule is to deter future unlawful *police conduct*. See also Amsterdam, Perspectives On the Fourth Amendment, 58 Minn L Rev 349, 369 (1974): ". . . the regulation of *police behavior* is what the Fourth Amendment is all about" (emphasis added). Applying the test of *Peltier*, *supra*, to the instant case, it is clear that application of the exclusionary rule serves no valid purpose.

The question again arises, what of *Almeida-Sanchez*? If "evidence obtained from a search should be suppressed only if it can be said that the law enforcement official had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment," *Peltier*, *supra*, then was *Almeida-Sanchez* itself wrongly decided (see dissent of Justice Brennan in *Peltier*, 422 US at 554)? Had the

statute in *Almeida-Sanchez* been a penal statute, the answer would be yes, for the constitutionality of penal statutes should be left to prosecutions for their violation. But *Almeida-Sanchez* involved a statute of criminal procedure, as it were, and not a penal statute. It could thus never be challenged in a criminal prosecution. Of course, it still remains true that the officers in *Almeida-Sanchez* acted in as good faith as those in *Peltier*. That Almeida-Sanchez received favorable treatment is a result that obtains in every case of prospectivity. It was necessary to reward Almeida-Sanchez because if there were no benefit to be gained from a challenge to the statute it would forever remain unreviewable, not being a penal statute. Peltier was not treated unfairly, Almeida-Sanchez was treated favorably as a necessary function of judicial review.

The Ninth Circuit also justified applying the exclusionary rule where an arrest was made in good faith reliance on an ordinance which was subsequently declared unconstitutional by relying on the "imperative of judicial integrity." 507 F 2d at 98. Petitioner submits that the Ninth Circuit wrongly applied that doctrine. In *Weeks* v *United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1913) this Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal trials. But it must be noted that *Weeks* did not involve a factual setting where it could be argued that the officer acted in good faith reliance on legislative or judicial pronouncements. The United States Marshall simply searched Weeks' home without a search warrant or arrest warrant. He acted "without sanction of law." 232 US at 393. Similarly, in *Elkins* v *United States*, 364 US 206; 80 S Ct 1437; 4 L Ed 2d 1669 (1960), in rejecting

the "silver platter" doctrine, this Court stated that the federal courts should not be "accomplices in the *willful* disobedience of a Constitution they are sworn to uphold" (emphasis added). 364 US at 223. But as recognized in *Peltier* and *Stone* v *Powell*, *supra*:

> . . . judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution.' 422 US at 538; 428 US at 485, fn2.

When a court admits evidence seized in good faith reliance on an ordinance which is subsequently declared unconstitutional, it is simply not acting as accomplice to a *"willful"* violation of the Constitution (if indeed there is any violation of the Constitution at all, see B *supra*). See also *Fuller* v *Alaska*, 393 US 80; 89 S Ct 61; 21 L Ed 212 (1968); *Linkletter* v *Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965).

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. *Burdeau* v *McDowell*, 256 US 465; 41 S Ct 574; 65 L Ed 1218 (1921). The requirement of standing to object is another example of a situation wherein a Fourth Amendment violation does not result in suppression. *Brown* v *United States*, 411 US 223; 93 S Ct 1565; 36 L Ed 2d 208 (1973). Note should also be taken of the fact that

illegally seized evidence may be used for impeachment purposes. *Walder* v *United States*, 347 US 62; 74 S Ct 354; 98 L Ed 503 (1954); *Harris* v *New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971). In short, the "imperative of judicial integrity" is a corollary to the principle of deterrence. The integrity of the court is not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution. *Elkins, supra*.

In conclusion, petitioner would point out that this Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. *Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose* (emphasis added). *Michigan* v *Tucker*, 417 US at 446.
>
> . . . when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence. *Michigan* v *Tucker*, 417 US at 450.

Professor Amsterdam has stated the need to limit the exclusionary rule to situations where its deterrent function is served thusly:

> As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more

> should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest. . . ." Amsterdam, Search, Seizure and Section 2255: A Comment, 420 Pa L Rev 378, 388-389 (1964).

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity.

II.

AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO TERRY v OHIO, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF, AND/OR TO REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY, IS NOT UNCONSTITUTIONAL.

Before analyzing the question of the constitutionality of the ordinance here involved, petitioner would point out that the Michigan Court of Appeals erred in reaching the issue. As argued in Argument I, the admissibility of the phencyclidene seized in this case does not depend on the constitutionality of the ordinance, for, as explained in Argument I, the evidence should be admissible as the arrest was valid, regardless of the constitutionality of the ordinance. However, since the Michigan Court of Appeals did pass on the question, and the Michigan Supreme Court declined to review that holding, petitioner believes a ruling by this Court on the question is appropriate.

A. The Police Power

Before reaching questions such as vagueness and self-incrimination, a fundamental question must first be discussed; that is, assuming for the moment the validity of the ordinance in all other respects, is the ordinance violative of due process as being beyond the police power of the state due to the nature of the conduct it attempts to prohibit? Petitioner submits that it is not.

The question is, what are the limitations on the legislative exercise of the police power, or, more particularly, what is the function of the courts in reviewing a legislative exercise of the police power? First, it must be observed that courts should and do exercise great restraint in this area. In an earlier era the Court did not exercise such restraint, see e.g. *Lochner* v *United States*, 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905); *Coppage* v *Kansas*, 236 US 1; 35 S Ct 240; 59 L Ed 441 (1915); *Adkins* v *Children's Hospital*, 261 US 525; 43 S Ct 394; 67 L Ed 785 (1923); however, *Nebbia* v *New York*, 291 US 502; 54 S Ct 505; 78 L Ed 940 (1934), heralded a new attitude, as evidenced by the statement that "the legislature is primarily the judge of the necessity of such an enactment (a penal statute prohibiting the sale of milk under established prices), that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." 291 US at 537-538. That this policy of restraint still prevails is demonstrated by the more recent case of *Griswold* v *Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965). There, though holding the statute in question unconstitutional as in conflict with the penumbral right of privacy, the Court

specifically refused to be guided by *Lochner* v *United States*, *supra*, saying, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 US at 482. Thus, keeping in mind the paramount role of the legislature in determining the wisdom and need for the ordinance in question, that all presumptions are to be indulged in favor of its validity, and that the ordinance may not be annulled unless "palpably in excess of legislative power," petitioner will discuss whether the ordinance exceeds the police power because of the nature of the conduct it seeks to prohibit.

The principles governing the limits of the police power are stated in *Lawton* v *Steele*, 152 US 133, 137; 14 S Ct 499; 38 L Ed 385 (1894) (referred to as the "classic statement" of the rule in *Goldblatt* v *Town of Hempstead*, 369 US 590, 594-595; 82 S Ct 987; 8 L Ed 2d 130 (1962)):

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

See also *Carolene Products* v *Thomson*, 276 Mich 172; 267 NW 608 (1936); *Grubaugh* v *City of St. Johns*, 384 Mich 165; 180 NW2d 801 (1970); *People* v *Poucher*, 398 Mich 316; 247 NW2d 798 (1976); 2 Cooley, Constitutional Limitations (8th ed), p. 733; 16 Am Jur 2d, Constitutional Law, sec 277 et seq. It has also been stated that, because of the presumption of validity, ". . . if the relation between the statute and the public

welfare is debatable, the legislative judgment must be accepted." *Grocers Dairy Co* v *Department of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 769, 770 (1966). Because of the wide discretion given the legislature, and the presumption of validity, one commentator has suggested that this Court has "all but abandoned the practice of invalidating criminal statutes on the basis that they bear no substantial relation to injury to the public," preferring to be "on more solid ground" in ruling, if a statute is to be invalidated, that it violates due process "on the more specific ground that it intrudes upon the protections of the Bill of Rights. . . ." LaFave and Scott, Criminal Law, sec. 20, p. 138.

In the instant case it is plain that if the public interest is served, it is served generally. Petitioner submits that there is a public interest in requiring persons to respond to questions, at least to the extent of identity, when the officer has a "reasonable suspicion that criminal activity is afoot." *Terry* v *Ohio, supra*. *Terry* allows a forcible stop, a Fourth Amendment seizure of the person, under appropriate circumstances. But what is the purpose of the stop if not to investigate?

> One general (governmental) interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of *investigating possibly criminal behavior* even though there is no probable cause to make an arrest. (emphasis added). *Terry* v *Ohio*, 392 US at 22.

And how did officer McFadden investigate in *Terry*? He "approached the three men, identified himself as a police officer, and *asked for their names*" (emphasis added). 392 US at 6-7. When the men "mumbled something" in response, Terry was seized, patted down, and a pistol found. Given all the circumstances observed by officer McFadden, Chief Justice Warren wrote that "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." 392 US at 23.[10]

If the purpose of the stop is for investigation, how is the investigation to occur but by the asking of questions, such as identity, as done by officer McFadden? In his concurring opinion in *Terry*, Justice White observed that while under appropriate circumstances a person may be "briefly detained against his will while pertinent questions are directed to him" he is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest. . . ." 392 US at 34. While refusal to answer may furnish no basis for an arrest in the absence of specific authority to arrest, this is an entirely different matter from whether the legislature has the power to make refusal to answer a crime. If it does, then refusal to answer does furnish a basis for arrest, not under the officer's right under *Terry* to briefly detain persons for investigatory purposes, but to hold the person to answer for the crime he has committed (and here the

---

[10] See also *Adams* v *Williams*, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972):

> A brief stop of a suspicious individual *in order to determine his identity* or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time (emphasis added).

detention is only until identification is learned; the defendant is then released to appear on the ordinance violation).

Laying aside all other questions, petitioner submits that the legislature may make failure to answer an inquiry as to identity a crime under circumstances where there exists a reasonable suspicion that criminal activity is afoot in that the ordinance does serve the public welfare. If a Fourth Amendment seizure of the person for investigatory purposes is permissible under appropriate circumstances because in balancing the interests involved the intrustion is justified by the governmental interest "of crime prevention and detection," 392 US at 22, then requiring an answer to the investigative inquiry, at least as to identity, is justified by the same public interest of crime prevention and detection, and is thus within the police power. See *People* v *Solomon*, 33 Cal App 3d 429; 108 Cal Rptr 867 (1973), *cert denied* 414 US 951 (1974), where, upholding a disorderly person statute with elements 1) refusal to furnish identity, 2) by one loitering on the streets, 3) under circumstances that infringe upon the public safety, the court stated:

> It is within the bounds of legislative power to proscribe conduct that interferes with prevention and detection of crime, where the proscription is consistent with constitutional right . . . We find the legislative power employed here to compel

> identification is consistent with constitutional right. 108 Cal Rptr at 871.[11]

---

[11] The Uniform Arrest Act, Sec. 2, while not making failure to identify subsequent to a *Terry* stop a criminal act, does authorize a two hour detention:

> 1) A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.
> 2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
> 3) The total period of detention provided by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

The Act has been adopted in a number of states, e.g. Del Code Anno title 11, sec. 1902; NH Rev Stat, sec. 594:2; General Laws of RI, sec 12-7-1; Anno Mo Stat, sec 84.710.

Also of importance is the Model Penal Code, sec 250.6, which *is* a penal statute:

> A person commits a violation if he loiters or prowls in a place at a time, or in a manner not usual for law-abiding individuals, under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor . . . *refuses to identify himself* . . . (emphasis added).

See also Model Code of Pre-Arraignment Procedure, Tentative Draft no. 1, sec. 2:02 (1) through (3).

B. Self-Incrimination

Though not the basis for the opinion below, an issue raised below was that to make failure to identify oneself subsequent to a *Terry* stop criminal was to compel the person stopped to be a witness against himself, in violation of the Fifth Amendment. Petitioner submits that the requirement is not in conflict with the Fifth Amendment, as the information requested is non-testimonial.

Cal Penal Code, Sec. 647e provides that a person who commits the following act is guilty of the misdemeanor of disorderly person:

> e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

A compulsory self-incrimination argument was raised against the identification requirement and rejected on several occasions by the California Court of Appeals. First, it is clear that the privilege is a bar against compelling *testimonial* communications, and is no bar against establishing identity, even where establishment of identity might lead to criminal charges. See *United States* v *Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973) (voice exemplars); *Schmerber* v *California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966) (blood sample); *Gilbert* v *California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967) (handwriting exemplars); *United States* v *Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)

(lineup, and speak words allegedly spoken by robber).[12] As stated in *Wade*, the accused was required "to use his voice as an identifying physical characteristic, not to speak his guilt." 388 US at 222-223. See also *California* v *Byers*, 402 US 424; 91 S Ct 1535; 29 L Ed 2d 9 (1971). The instant case is distinguishable from cases such as *Marchetti* v *United States*, 390 US 39; 88 S Ct 697; 19 L Ed 2d 889 (1968) and *Grosso* v *United States*, 390 US 62; 88 S Ct 709; 19 L Ed 2d 906 (1968) in that the statutes in those cases required more than a mere statement of identity, instead requiring the giving of information the *content* of which could be used against the provider of the information in a criminal proceeding.

Further, the giving of the information in the instant case is in no way incriminatory; it is remaining *silent* which is the essence of the offense. As well put in *People* v *Wegar*, 251 Cal App 2d 584; 59 Cal Rptr 661, 673 (1967), *cert denied* 389 US 1047 (1968): "The silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation under circumstances which call for one." Although the term "right to silence" is frequently used as a shorthand expression for the Fifth Amendment prohibition against compelling a person to be a witness against himself, the two do not equate. A person may be compelled to supply information so long as he is not compelled to give information which will incriminate him. If it were otherwise, witnesses could not be subpoened to testify, and income tax and census forms would go unfiled.

---

[12] See also *People* v *Hall*, 396 Mich 650; 242 NW2d 377 (1976) (lineup and speaking requirement); *People* v *Rankins*, 81 Mich App 694; 265 NW2d 792 (1978) (hair sample); *People* v *Henderson*, 69 Mich App 418; 245 NW2d 72 (1976) (voice exemplars).

Petitioner agrees with the California Court of Appeals that the ordinance's requirement of identification "does not conflict with the privilege against self-incrimination." *People* v *Solomon, supra,* 108 Cal Rptr at 872.

C. Vagueness

The Michigan Court of Appeals held that the ordinance is vague for failing to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden in that "An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime." The court also held that the ordinance was vague for seeking "to make criminal conduct which is innocent," and for undercutting the probable cause standard of the Fourth Amendment by "sanctioning full searches on suspicion." Keeping in mind that "The Constitution does not require impossible standards," *United States* v *Petrillo*, 332 US 1, 7; 67 S Ct 1538; 91 L Ed 1877 (1946) and that "lack of precision is not itself offensive to the requirements of due process," *Roth* v *United States*, 354 US 476, 491; 77 S Ct 1304; 1 L Ed 2d 1498 (1957), Petitioner submits that the ordinance is constitutional.

The logic of the Michigan Court of Appeals' position that the ordinance is vague because "An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore

cannot know when refusal to identify himself will be a crime" is plainly untenable. Neither can an innocent citizen generally know when a police officer has probable cause for his arrest, and thus cannot know when resisting arrest will be a crime, yet it would not rationally be suggested that the offense of resisting a lawful arrest is unconstitutionally vague. Just as the arrest is governed by probable cause standards, the stop in the instant case is governed by the standards of *Terry* v *Ohio*. Thus, no claim can be made that the ordinance gives the police "unbridled discretion" to stop persons. See *People* v *Solomon, supra,* 108 Cal Rptr at 871. The focus of the inquiry should be on the term "identify."

Although petitioner will make brief mention of it, it must be remembered that the instant case is not a "verifiable proof" case, but a failure to identify case. Turning again to the California Court of Appeals, which has dealt with this precise issue, it can be seen that the term "identify" is not vague.

The court in *People* v *Wegar, supra,* 59 Cal Rptr at 667-668 closely analyzed the term "identify" and found it sufficiently precise.

> Here, again, we may look to the commonly accepted meaning of the words. According to the American College Dictionary, 'identify' means to 'establish as being a particular person or thing; attest or prove to be as purported or asserted.' 'Identification,' according to College Law Dictionary means 'Proof that a person or thing is the person or thing (he or) it is supposed or represented to be. . . .' 59 Cal Rptr at 667-668.

Petitioner agrees with *People* v *Solomon, supra* at 871 that the "person requested to identify himself is put on direct notice as to what constitutes the unlawful conduct, for before any violation of the statute can occur the request for identification must first be made." The area possibly open to interpretation is the phrase "verifiable proof, written or oral," and again petitioner would point out that this is not a verifiable proof case. If it were, it would be petitioner's position that "verifiable proof" is any information of identity that could be verified as "proof that a person . . . is the person . . . (he) is supposed or represented to be." *People* v *Wegar, supra*.

Two other points in the opinion require comment. First, the court held that the ordinance attempts to "make criminal conduct which is innocent." This formulation appears to be a way of saying that the ordinance is outside the police power, a proposition rejected by petitioner at IIA *supra*. Petitioner would here note *People* v *West*, 106 NY 293; 12 NE 610, quoted in Clark and Marshall, Crimes, Sec 1:05, p. 29:

> It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the prohibited act was, before the statute, lawful or innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, and not at all evil in their intrinsic quality . . . the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere.

As to the statement by the Michigan Court of Appeals that the ordinance "sanctions full searches on suspicion" petitioner can only point out that the court misperceived the ordinance, for the search is not incident to the stop, but to the custodial arrest for the ordinance violation. *United States* v *Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973); *Gustafson* v *Florida*, 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973). If this Court reaches the question, the Michigan Court of Appeals should be reversed and the ordinance upheld.

CONCLUSION

Wherefore, Petitioner concludes that the Court should reverse the Michigan Court of Appeals, hold that the seizure of the phencylidene was accomplished without violation of any constitutional right of respondent, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

William L. Cahalan
Prosecuting Attorney

Edward Reilly Wilson
Chief Appellate Attorney

Timothy A. Baughman
Assistant Prosecuting Attorney

Wayne County — State of Michigan
12th Floor — 1441 St. Antoine
Detroit, Michigan 48226

Dated: November 14, 1978